IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the Case.

CRLA No. 801 of 2001 . decided on 19-07-2003

Pappan & others Vs State

Approved for reporting

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~~Not approved for reporting~~

Date of decision 19.7.2003 Initial of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

Court No.2

Reserved

Criminal Appeal No. 801 of 2001

1. Pappan S/o Om Prakash,
2. Om Prakash S/o Muni Ram -----Appellants

Vs.

State of Uttaranchal ------Respondent

Hon'ble P.C. Verma A.C.J.

Hon'ble Irshad Hussain J.

(Delivered by Hon'ble Irshad Hussain J.)

This Criminal appeal is directed against the judgment and order dated 25.10.2000 passed by IIIrd Additional Sessions Judge, Haridwar in Sessions Trial No. 68 of 1998.

Appeallant Pappan and Om Prakash are the son and father. Injured Soran Singh (P.W.1) is the real brother of appellant Om Prakash. Informant eye-witness Yashpal (P.W.2) is also their real bother. Smt. Krishna deceased was the wife of Soran Singh. They are residents of village Rani Mazra P.S. Pathri, District Haridwar and their residential hutments and 'gher' (cattle house) are situate in village abadi. There was some dispute in regard to one of the gher and relations between the brothers were strained.

Briefly stated the prosecution case in regard to the occurrence is that on 17.12.1997 at about 7:30 a.m. Pappan, his father Om Prakash and his mother Smt. Meela carrying gandasas and axe started abusing Soran Singh, his wife Smt. Krshna and son Promod Yashpal was giving fodder to his cattle in the 'gher'. They were told to behave decently. The then resorted to making assault with their said weapons causing injuries to Soran Singh and Smt. Krishna. Hearing alarm co-villagers Nakli Ram, Rajendra Singh and others reached at the scene of the occurrence. Smt. Krishan succumbed to her injuries at the spot itself. Soran Singh received head injuries and fell there on the ground. Informant eye-witness Yashpal got prepared written report, Ext. Ka-1 and lodged it at police station the same day at 9:15 a.m. A case U/s 302, 307and 506 IPC was registered.

Investigation of the case was taken up by SHO Naresh Kumar Johari (P.W.10) who besides completing the preliminary formalities arrested accused-appellant Om Prakash the same day and at his instance axe, Ext.-1 was recovered form the heap of straw inside his 'gher' vide memo. Ext. Ka-17. Accused-appellant Pappan had surrendered in the court and per order dated 02.01.1998, Ext. Ka-19 police remand was granted. Investigation Officer made query from this accused-appellant and on his pointing, on 03.01.1998, 'gandasa', Ext.-2, the other weapon of assault was recovered form a grove where it was kept buried under the earth, vide memo, Ext. Ka-21. Both these weapon of assault and sample of the blood-stained and plain earth seized form the scene of the occurrence as well as clothes of deceased Smt. Krishan were sent to chemical examiner and Serologist for expert opinion. The report of expert, Ext. Ka-25 revealed that both these weapons and 'Dupatta' of the deceased (material exhibits 1,3 and 6 respectively) were found stained with human blood of same group- 'B'. On completion of the investigation the charge-sheet, Ext. Ka-23 against both the accused-appellant as well as against Smt. Meela was submitted on 11.01.1998. Initially investigation of the case was conducted by S.I. Atar Singh (P.W.4) who had held inquest on the dead-body of Smt. Krishan and prepared inquest report, Ext. Ka-2 and relevant documents and dispatched the dead-body for postmortem.

Accused-appellants and Smt. Meela, the third accused of the case pleaded not guilty and contended that the complainant-informant and his injured brother wanted to sell out the land of the 'gher' through which they have their passage and on being resisted they have been falsely implicated in this case.

During the trial, prosecution in order to prove guilt of the accused-appellants and third accused Smt. Meela relied upon the evidence of ten witnesses. Of these P.W.1, Swarn Singh is the injured eye-witness of the case whereas P.W.2, Yashpal is the informant eye-witness of the occurrence. They supported the prosecution case by their evidence. P.W.3, Rajendra cited as eye-witness in the F.I.R.,

turned hostile and did not support the prosecution version in regard to the identity of the assailants. P.W. 4 and P.W. 10 are the two Investigating Officer of the case. P.W.8, Head Constable Rampal Singh proved Check F.I.R. and copy of the G.D. report etc. P.W.9, Constable Jagpal Singh took the dead-body for postmortem after inquest and lateron after postmortem, handed over the dead-body of Smt. Krishan to her legal representatives for cremation.

P.W.5, Dr. O.P. Sharma medically examined injured Swarn Singh at 10:50 a.m. on 17.12.1997 and prepare injury report, Ext. Ka-8. Injuries found are as below:-

1. Incised wound 9.5cm.x 1.0cm.x bone deep on left side forehead obliquely placed, extending backward upto left parietal region tailing upward, margins clean-cut, well defined, starting from 1.3cm. above form root of nose.
2. Incised wound 12.0cm.x 1.5cm.x bone deep (through and through) involving all upper lip extending upto right cheek. Margins clean-cut and well defined.
3. Two linear abrasions each measuring 9cm. in length traversly placed on right side neck 2.0cm. apart form each other and swelling in area of 10.0cm.x 5.0cm.

In the opinion of the Medical Officer the injures were fresh injury No. 3 was simple and injuries No. 1 and 2 caused by sharp object were kept under observation.

Medical Officer also proved supplementary injury report, Ext. Ka-9 based on Radiological examination of these two injuries. It was found that there was fracture of parietal bone as well as fracture of maxilla and the right second molar tooth was found completely broken and, thus, these injuries No. 1 and 2 were grievous in nature. Medical Officer also gave out that these injures were probably caused by axe, ext.-1 and the chances of sustaining these injuries by gandasa. Ext.-2 were considerably less.

P.W.7, Dr. Yogesh Kumar gave evidence to prove X-Ray Films (material exhibits 3 & 4) pertaining to above two injuries of the injured and his report Ext. Ka-11.

P.W.6. Dr. S.C. Srivastava performed postmortem of the dead-body of Smt. Krishna at 3:30p.m. on 17.12.1997 and prepared postmortem report, Ext. Ka-10. Following ante mortem injuries were detected:-

1. Incised wound vertically placed 4cm.x bone deep, on left side head above left ear.
2. Incised wound 1cm.x 0.5cm.x through and through right pinna.
3. Incised wound 3cm.x 1cm. on right side face, 1cm. below right eye.
4. Incised wound 4cm.x 1cm.x bone deep right side face and nostril with fractured maxilla.
5. Incised wound 2cm.x 1cm.x muscle deep, 5cm. below right ear.
6. Incised wound 1 cm.x 0.5cm. x through and through right pinna.
7. Traumatic swelling with contusion right side head and face with fracture of mandible.
8. Incised wound 6cm.x 2cm.x bone deep dorsum of right forearm 5cm. above right wrist.
9. Incised wound 6cm.x 2.5cm.x bone deep on dorsum of right hand with fracture of 1st and 4th metacarpals.

On internal examination left temporal bone was found fractured. Brain membrane was congested and both chambers of heard were empty. There was digested food in the stomach and small intestine whereas in the large intestine, there were gases and faecal matter.

In the opinion of the Medical Officer the cause of death was shock and haemorrhage due to ante-mortem injuries, which occurred about half day ago. He also gave out that the ante-mortem injuries cold be sustained by axe, Ext.-1 and there was no possibility of sustaining the injuries by use of gandasa, Ext.-2.

No evidence was adduced in defence.

Learned Sessions Judge made an appreciation of the evidence of the prosecution and on taking into account the facts and circumstances came to the conclusion that accused-appellants namely Pappan and his father Om Prakash have assaulted both the victims,

Injuries of one of them Smt. Krishna proved fatal and, therefore, found them responsible for committing the offence of murder as well as attempt to commit murder punishable U/s 302/ 307 IPC and convicted and sentenced them to imprisonment for life under the fires count and R.I. for 7 years each under the second count with the aid of section 34 IPC. They were acquitted of the charge U/s 506 IPC. Third accused Smt. Meela was, however, acquitted of all the charges U/s 302/34, 307/34 and 506 IPC on the ground that her participation in the assault has not been proved beyond doubt.

Heard Sri G.S. Saxena, learned counsel for the appellants and learned A.G.A. and have carefully gone through the evidence and material on record.

Considering the evidence of the injured Swarn Singh (P.W.1) and eye-witness Yashpal (P.W.2) in regard to the place and time of the occurrence corroborated by the evidence of Medical Officers Dr. O.P. Sharma (P.W.5) who examined above injured and Dr. S.C. Srivastava (P.W.6) who performed postmortem on the dead-body of Smt. Krishna, the prosecution version in this regard was not challenged during the arguments by the learned counsel for the appellants. It is also indubitable that the death of Smt. Krshna was homicidal. Considering this aspect also the evidence of the prosecution was sought to be discredited in regard to the identity of the assailants.

P.W.1, Swarn Singh in his cross-examination testified that occurrence took place in the month of December and at the time of the occurrence there was fog. Pointing out to this statement, learned counsel for the appellant submitted that the present of fog must have obstructed the visibility and it was difficult for the witness to have fixed the identity of the assailants. To bring home his point of view learned counsel also pointed out to the fact that in the F.I.R., Ext. Ka-1, weapons of assault have not specifically been assigned to particular assailant and the reason for this was that due to fog, the witnesses would not have been able to see as to who were the assailants and what weapon was then wielded by each of them. In view of this

learned counsel submitted that these aspects of the matter were sufficient to draw an inference that the witnesses have probably no occasion to fix the identity of the assailants and the appellants & one another were nominated as the assailants on account of enmity and that the learned trial court fell in error in not taking in to consideration these aspects while making appraisal of the evidence. We find no merit in this argument because the assailants, being the close relatives of the victims and the witness, their identification even in fogy weather was possible and more so, when both P.w.1 and P.W.2 gave out that before making assault, the assailants have started quarrel by making abuses and making filthy remarks against the victims. Further, the occurrence took place at about 7:30 a.m. by which time the density of the fog is normally reduced to considerable extent and there would have been no difficulty in fixing the identity of the assailants by the witnesses.

As regards the argument that since each of the assailant were not assigned possession of particular weapon of assault in the F.I.R. Ext. Ka-1, its genuineness becomes doubtful, it need to be stated that it is well settled that F.I.R. need not disclose all the facts in great detail because the purpose of the F.I.R. is only to report commission of crime to the police and to bring it into motion to investigate the offence. The Apex Court in a recent decision in the case of Superintendent of Police, CBI and others Vs. Tapan Kr. Singh, 2003 Cri.L.J. 2322 (SC) reiterated the said principle regarding the F.I.R.. Considering this aspect of the matte we do not agree that the veracity of the F.I.R. stand assailed in this case.

Learned counsel for the appellants then sought to discredit oral evidence of injured Swarn Singh and eye-witness informant-Yashpal by pointing out to certain contradictions claiming that the learned Sessions Judge ignored import of these infirmities in relation to the credibility of their evidence. P.W.1 has assigned specific weapons wielded by the two appellants and co-accused Meela. He gave out that accused-appellant Om Prakash wielded the axe whereas accused-appellant Pappan and accused Meela were

carrying a gandasa each at the time of occurrence. While the witness has stated that he himself and his wife were assaulted by these weapons he also went to state that first of all accused-appellant Om Prakash gave gandasa's blow on the person of his wife Smt. Krshna and thereafter she was assaulted by the assailants-appellant Pappan. The witness himself was then assaulted by the assailants and that his wife was also given axe blows in the occurrence. He also stated that he was assaulted by gandasa, which was having a blade of about 1 feet having about 5cms.width. The other witness informant-Yashpal stated that the appellants and accused Meela have simultaneously started assaulting the two victims. According to him injured Swarn Singh also received axe blows on the head and lip and that he had not seen any blow of gandasa being given to the injured. He also testified that Smt. Krishna deceased had received number of axe blows on her person. No doubt there are some contradictions in the evidence of both these witnesses in regard to the blows of different weapons namely gandasa and axe been given to the two victims but it is of significance that they are consistent in their evidence that the assailants wielded their weapons against both the victims simultaneously. When assault in this manner is made, an element of surprise create state of confusion in the minds of the witnesses as a result of which some discrepancies in their evidence were bound to occur and these not being material could not have safely been taken to discredit their entire evidence and doubt their trustworthiness.

Against these witnesses the medical evidence of the case was also sought to be utilized by submitting that both the Medical Officers (P.W.5 and P.W.6) probablized sustaining of the injuries by the victims by use of axe only and in the peculiar circumstances of the case the ocular evidence become untrustworthy and should have been disbelieved by the learned Sessions Judge. It is well settled that medical evidence is only corroborative and it can be utilized to discredit the ocular evidence, only when it completely rules out the possibility of sustaining of the injuries by the victims in the manner as alleged by the prosecution. It is not so in the instant case because in

relation to the injuries of the P.w.1, Medical Officer Dr. O.P. Sharma (P.W.5) also stated that the injures were probably caused by an axe and the chances of the injuries being sustained by a gandasas are less. It is thus, obvious that the Medical Officer does not rule out completely the possibility of the injuries even being cause by gandasa. Further, in regard to the ante-mortem injuries of Smt. Krishna, Dr. S.C. Srivastava (P.W.6) gave out that these were caused probably by axe, Ext.-1 but these were not caused by gandasa, Ext.-2 blade of which was not sharp. Specific reason has been given for not sustaining the ante-mortem injuries by this weapon. In this connection reference may be made to the evidence of P.W.10 S.H.O. Naresh Kumar Jauhari who proved that as a result of disclosure statements of accused-appellant Om Prakash and accused-appellant Pappan, recovery of axe, Ext. -1 and gandasa, Ext. -2 was on their instance effected on 17.12.1997 and 03.01.1998 vide seizure memos, Ext. Ka-17 and Ext. Ka-21 respectively. The recovery of the axe, Ext. -1 Ka-made on the day of the occurrence itself, whereas the gandasa, Ext.2 was recovered after 16 days on 03.01.1998 and both these weapons of assault were found to have bloodstains on the blades. These weapons alongwith other seized articles as well as clothes of the smt. Krishna deceased were examined by Chemical Examiner and Serologist whose report, Ext. Ka-25 proves that these two weapons and 'Dupatta' of the deceased, Exts. 1,3 and 6 were found to have human stains of blood of same group 'B'. There can be no doubt that recovery of these weapons at the instance of the accused-appellants provide additional evidence to connect them with the commission of crime as well as use of both these weapons in the assault.

As mentioned above gandasa, Ext. Ka-2 was recovered after 16 days and it is not possible to say that the weapon was concealed after the occurrence with its original physical properties without getting the blade blunt and therefore, in the face of the definite evidence of both P.W.1 and P.W.2 there will be no justification to argue that the appellant Pappan has not wielded this weapon in the assault of the two victims merely on the strength of

above medical evidence. As stated above the presence of blood of the same group as that of deceased Smt. Krishna on the said weapon is additional evidence to link the weapon with the commission of the offence and considering this aspect medical expert's opinion cannot be treated as final and binding. Learned counsel for the appellants press in to service a reported decision of the Apex Court in the case of State of Haryana Vs. Ram Singh and Rai Sahab and another Vs. State of Haryana, 2002 Supreme Court Cases (Cri) 350 in support of the argument that there being inconsistency between the ocular and medical evidence the entire prosecution case becomes doubtful and benefit of doubt should be given to the accused. Having gone through the decision we are of the view that the facts of the reported case were at variance in as much as against the claim that accused had fired one shot two several gun shot injures one from the front and another from the back of the victim were detected and therefore, the medical evidence was found to run counter to the oral evidence. In the instant case the inconsistency between the oral evidence and the medical evidence is not as glaring as may lead to the inference that the injuries of the two victims could not have been sustained in the manner as alleged by the prosecution and corroborated by the direct evidence. We also cannot loose sight of the fact that medical evidence is usually opinion evidence on the basis of which cogent and definite direct evidence cannot be said to be untrustworthy and therefore, in the peculiar circumstance of the case we are of the firm view that the learned Session Judge rightly placed reliance on the direct evidence in the case and did not attach much importance to the inconsistency with the medical evidence.

The evidence about the disclosure statements of the accused-appellants and recovery of those weapons at their instance was also adversely commented upon by submitting that the Investigating Officer procured no independent public witness when the two accused-appellants were examined and on their instance recoveries were affected.

It is in the evidence of Investigating Officer (P.W.10) that at the time of the arrest of accused-appellant Om Prakash no public witness was summoned. The arrest was made on the day of the occurrence itself and thereafter on the disclosure statement the axe, Ext. -1 was recovered vide seizure memo, Ext. Ka-17. Similarly, no public witness was present when recovery at the instance of accused appellant Pappan was affected on 03.01.1998 vide seizure memo, Ext. Ka-21. However, other police personnel were present on both the occasions and at the time of the earlier recovery at the instance of accused-appellant Om Prakash the informant-Yashpal @ Manga was also one of the witness. The factum of recoveries have, however, been proved by the evidence of Investigating Officer. Even if no independent witness was taken at the time of recovery, the evidence of Investigation Officer cannot be rejected merely on the ground that the evidence of the police witness cannot be believed without corroboration. The Apex Court in the case of Nathu Singh Vs. State of Madhya Pradesh, AIR 1973, Supreme Court 2783 laid stress on the legal proposition that "the mere fact that the prosecution witnesses are police officer is not enough to discard their evidence, in the absence of evidence of their hostility to the accused". The cross-examination of the I.O. could not bring on record anything material as may show his animus towards the appellants and therefore, on the strength of the said principle the evidence of the Investigating Officer about the recoveries could safely be believed.

In regard to the evidence of recoveries admissible U/s 27 of the Evidence Act Division Bench of the Kerla High Court in the case of Mathew Abbin Vs. State of Kerala-1991 Criminal Law Journal NOC 16 (Kerala) observed that uncorroborated version of Investigating Officer regarding discovery of weapon if found unblemished will certainly be acceptable. As stated above, the evidence of the I.O. has been found to be credible and further it found support from the report of the expert about presence of blood on both the weapons of assault and therefore, the facts and circumstances of the case do not warrant rejection of the evidence of the Investigation

Officer. The Apex Court in a recent decision in Karam Jeet Singh Vs. State (Delhi) Administration, 2003 Criminal Law Journal 2021 (S.C.) observed that there is no principal of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied upon because the presumption that a person acts honestly applies as much in favour of police person as of other person. The view of the Apex Court further lend support to the above inference and in the face of the facts and circumstances of the case the argument of the learned counsel seeking rejection of evidence of the Investigating Officer about the recoveries carry no conviction. In our view, the learned Sessions Judge also rightly placed reliance on the evidence of the Investigating Officer in that regard.

Learned counsel for the appellants also submitted that only one independent witness, P.W.3, Rajendra also named in the F.I.R. was examined and since this witness turned hostile, the prosecution version becomes doubtful. It is well settled that if other direct evidence is reliable and any independent witness is turned hostile and do not support the prosecution version about the actual occurrence that cannot be a ground for disbelieving the case of the prosecution. Apex Court laid stress to this proposition in the case of Bhola Ram Kushwaha Vs. State of Madhya Pradesh, 2001 Criminal Law Journal 1169(SC). As discussed above, the evidence of P.W.1 and P.W.2 inspire confidence in proving the role of both the accused-appellants in the assault of the two victims of the case and it is immaterial if P.W.3, Rajendra was declared hostile as not being supporting the case of the prosecution. It was also argued that another independent witness named in the F.I.R. was not examined by the prosecution and this aspect also tell upon the reliability of the prosecution version. Again the submission is without force because there is no legal requirement as mandated by Section 134 of Evidence Act, to examine particular number of witnesses to prove the case of the prosecution. Since the evidence adduced in the case inspire confidence, non-examination of any other witness of the fact has no bearing on the prosecution case.

It was then submitted that the F.I.R. of the case was delayed one and the circumstances indicate that the same was prepared after due deliberations and consultations and for this reason its genuineness becomes doubtful. The occurrence took place at 7:30 a.m. during winters and the place of the occurrence is situate at a distance of about 10 k.m. for the police station. The F.I.R. was lodged after two hours at 9:15 a.m. and considering the said distance it cannot be accepted that there was delay in lodging the F.I.R.

Attention was drawn to inquest report Ext. Ka-2 in which balkati and axe have been mentioned as the weapon of assault and accordingly it was argued that at the time of preparation of the inquest report the F.I.R. of the case has not come into existence and that the same was prepared lateron after deliberations and was ante-timed. It is well settled that any remissness on the part of the Investigating Officer cannot be taken to weaken the case of the prosecution when the direct evidence inspire confidence and is reliable. Even otherwise, S.I. Atar Singh (P.W.4) who held inquest on the dead body and prepared inquest report had been straightforward in admitting his mistake in wrongly mentioning 'Balkati' as weapon of assault in the inquest report. He has categorically asserted that F.I.R. was there when the inquest was held on the dead-body. Considering the definite evidence of the witness we find no reason to disbelieve his evidence. In other words, the defence cannot be permitted to make capital out of the above minor infirmity in the description of the weapon in the inquest report.

Lastly, learned counsel for the appellants argued that as stated by P.W.1 there was some altercation and exchange of abuses between the victims and the assailants and therefore, the appellants have not come prepared to commit the offence of murder and at the most the appellants could be held responsible for committing the offence of culpable homicide not amounting to murder punishable U/s 304 I.P.C.. We see no force in this argument also. It is in evidence that the assailants came there at the scene of occurrence with weapons of assault and Smt. Krishna was given fatal blow on the head a vital part

of the body with intention to causing such bodily injury as is sufficient in the ordinary course of nature to cause death and therefore, the case of the appellant was squarely covered under clause 3rd of section 300 I.P.C. and since there was meeting of minds between the accused-appellants they have been rightly held guilty and convicted for an offence of murder punishable U/s 302 IPC read with section 34 IPC. There was prior concert in making the attempt to commit murder of injured of the case and therefore, the accused-appellants were also rightly convicted for an offence punishable U/s 3007 IPC read with section 34 IPC.

In view of the foregoing reasons we find no substance and merit in this appeal. We hereby dismiss it. The judgment and order dated 25.10.2000 passed by the learned Sessions Judge are confirmed. The appellants are on bail. There bail bonds are cancelled and sureties are discharged. They shall surrender before the court concerned and shall be sent to jail to serve out the sentences passed against them.

Let the record of the trial be sent back to the Court below for necessary compliance. This Court shall be informed accordingly within 15 days about the compliance.

(Irshad Hussain, J.) **(P.C. Verma A.C.J.)**

July 19, 2003:
NCM